

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NOS. 2019-224-E and 2019-225-E- ORDER NO. 2021-509

AUGUST 20, 2021

IN RE: South Carolina Energy Freedom Act (House)	ORDER HOLDING 2021
Bill 3659) Proceeding Related to S.C. Code)	IRP UPDATE IN
Ann. Section 58-37-40 and Integrated)	ABEYANCE AND
Resource Plans for Duke Energy Carolinas,)	GRANTING
LLC)	RECONSIDERATION
)	AND CLARIFICATION
and)	OF ORDER NO. 2021-447
)	
South Carolina Energy Freedom Act (House)	
Bill 3659) Proceeding Related to S.C. Code)	
Ann. Section 58-37-40 and Integrated)	
Resource Plans for Duke Energy Progress,)	
LLC)	

This matter comes before the Public Service Commission of South Carolina (“Commission”) on the post hearing petitions or motions of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together “Duke” or “Companies”) to (1) hold the filing date for its 2021 Integrated Resource Plan Update (“IRP Update”) in abeyance pending a Commission determination on the Modified Integrated Resource Plan required pursuant to Commission Order No. 2021-447 and to (2) reconsider or clarify a typographical error in Commission Order No. 2021-447. The Commission receives this post hearing motion from Duke Energy Carolinas, LLC and Duke Energy Progress, LLC as allowed pursuant to S.C. Code Ann. § 58-27-2150 (2015) and S.C. Code Ann. Regs. 103-854 (2012). Prior to the issuance of Commission Order related to the post hearing motion dated July 8, 2021, Duke

filed a Petition for Reconsideration of July 21, 2021 Directive on July 30, 2021. This Order of the Commission grants the post-hearing motions of the Duke Companies in both respects as explained in detail herein related to the timing for the Companies to file an annual update and related clarification sought by Duke.

I. PROCEDURAL HISTORY

This petition for post hearing relief comes as a result of the proceedings in Docket Nos. 2019-224-E and 2019-225-E, which concern the Integrated Resource Plans of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC respectively. The proceedings were conducted virtually beginning on April 26, 2021, and ending May 5, 2021. The Commission voted on the matter during its June 17, 2021 Business Meeting and issued Order No. 2021-447 on June 28, 2021. To the extent that any rulings within this Order conflict with Order No. 2021-447, this Order supersedes the prior Order. Any matters not specifically addressed in this Order remain unchanged. Our holdings herein and all holdings and provisions contained in Order No. 2021-447 that are not amended or altered by this Order, are all supported by the record of this case.

II. DUKE PETITIONS FOR ABEYANCE OF DEADLINE FOR 2021 IRP UPDATE AND FOR RECONSIDERATION OF A CLAUSE RELATED TO MINIMAX REGRET ANALYSIS METHODOLOGY

A. Duke Companies' Request to Hold 2021 IRP Update Deadline in Abeyance

On July 8, 2021, the Duke Companies filed a petition or motion asking the Commission “to hold in abeyance the Companies’ obligation to file an annual update to their 2020 integrated resource plans (“IRPs”) *until after the Commission issues an order*

regarding the Companies' modified IRPs."¹ (emphasis added).

To support this petition, the Duke Companies assert,

[s]uch an abeyance is both (1) consistent with the approach taken by the Commission with respect to Dominion Energy South Carolina's ("DESC") obligation to file its annual IRP update while modifications to its 2020 IRP were still pending before the Commission; and (2) necessary because it would be impractical, if not virtually impossible, for the Companies to prepare both modified IRPs as directed in Order No. 2021-447 *and* 2021 IRP updates in the next two months.²

As part of the evidentiary hearing, DEC/DEP Witness Glen Snider testified that the Duke Companies planned to file their 2021 IRP updates on or about September 1, 2021—approximately one year after the September 1, 2020 initial filing of the Companies' 2020 comprehensive IRP. The Duke Companies state that the target date of September 1st for its annual IRP update was originally selected by Duke to align the timing of the South Carolina IRP update with its required North Carolina's IRP. N.C.U.C. Rule R8-60(h). However, the North Carolina Utilities Commission (N.C.U.C.) recently waived the requirement for DEC and DEP to file 2021 IRP updates. *See*, N.C.U.C. Order Waiving in Part Rule R8-60(h)(2) and Giving Notice of Additional Proceedings, N.C.U.C. Docket No. E-100 Sub 165 (June 29, 2021). As a basis for their motion, the Duke Companies further assert that filing updates to the 2020 IRPs is now solely a South Carolina requirement and that the Commission has flexibility to accommodate the timing requested by Duke to allow the Duke Companies to complete the Commission-ordered modifications to the 2020 IRPs first before filing the 2021 IRP Update for Duke Energy Carolinas, LLC and Duke Energy

¹ Duke Petition filed July 8, 2021 (<https://dms.psc.sc.gov/Attachments/Matter/a3242d14-8753-4a44-b5a4-6f53de2ed9f9>) at p. 1.

² *Id.*

Progress, LLC. Thus, the Duke Companies want the Commission to wait and set the date for filing its 2021 IRP Update after the Commission approves the modified 2020 IRPs for the Duke Companies. The Duke Companies assert that it “would be nearly impossible and unduly burdensome for the Companies to conduct the comprehensive analyses and modeling adjustments necessary to complete the significant work required to file both the modified 2020 IRPs and the [2021] IRP update[s] within the next 60 days.”³

B. Request for Reconsideration and/or Clarification of Order 2021-447 Related to the Methodology for a Minimax Regret Analysis

In the same July 8, 2021 filing, Duke also seeks reconsideration by the Commission of one ordering clause of Order No. 2021-447. Duke seeks clarification from the Commission to confirm that the Companies are directed to conduct a minimax regret analysis for inclusion in their future integrated resource plan (“IRP”) filings using the methodology set forth by Office of Regulatory Staff (“ORS”) Witness Lane Kollen rather than Carolinas Clean Energy Business Association (“CCEBA”) Witness Kevin Lucas.

Order No. 2021-447 directs the Duke Companies to include a minimax regret analysis in future IRP filings to compare the risk of each portfolio presented in the IRPs. Order No. 2021-447 instructs the Duke Companies to adopt the methodology proposed by ORS Witness Kollen: “. . . Therefore, for each modified IRP, IRP update, and future IRP, Duke is directed to include a minimax regret analysis of the type used and described by ORS Witness Kollen. . . .” Order No. 2021-447, p. 84; *see also* Finding of Fact #24, pp. 82-84. The Commission found that ORS Witness Kollen’s minimax regret analysis

³ Duke Petition filed July 8, 2021 (<https://dms.psc.sc.gov/Attachments/Matter/a3242d14-8753-4a44-b5a4-6f53de2ed9f9>) at p. 3.

approach and methodology more appropriate and that they should be used by the Duke companies. However, later in the Order in Ordering Paragraph 19, the Commission appears to have inadvertently replaced Witness Kollen's name with that of CCEBA Witness Lucas in the corresponding Ordering Paragraph. The Duke Companies seek clarification and confirmation that the Commission intended for the Duke Companies to use Witness Kollen's proposed methodology as discussed in the Order for the required minimax regret analysis in all future IRPs, as well as any modified IRP and IRP Updates.

C. July 30th Petition for Reconsideration of the Commission's July 21, 2021 Directive

Prior to the Commission entering a formal Order memorializing its July 21, 2021 Directive related to the July 8, 2021 Motion by Duke, Duke filed a Petition for Reconsideration of July 21, 201 Directive which required the Companies to file an annual update to their Integrated Resource Plans now pending before the Commission (the "IRPs") on or before December 6, 2021. In its Petition for Reconsideration dated July 30, 2021, Duke requests that the Commission hold in abeyance the Companies' obligation to file an update to their IRPs until no earlier than sixty (60) days following the issuance of an Order by the Commission accepting their modified IRPs. Duke argues that "[u]nder Act 62, the requirement to annually update an IRP is triggered by the Commission's final approval and 'acceptance' of the utility's proposed IRP. In other words, a utility must file an update to an IRP within one year after the Commission accepts or otherwise approves it" and that the annual requirement is not based upon calendar or fiscal year. Duke's Petition for Reconsideration, p. 2, ¶ 1 (July 30, 2021).

Section 58-37-40(D)(1) states that:

An electrical utility shall submit annual updates to its integrated resource plan to the commission. An annual update must include an update to the electric utility's base planning assumptions relative to its most recently accepted integrated resource plan, including, but not limited to: energy and demand forecast, commodity fuel price inputs, renewable energy forecast, energy efficiency and demand-side management forecasts, changes to projected retirement dates of existing units, along with other inputs the commission deems to be for the public interest. The electrical utility's annual update must describe the impact of the updated base planning assumptions on the selected resource plan

S.C. Code Ann. § 58-37-40(D)(1) (Supp. 2020). Duke further asserted that under the current procedural schedule, the Companies' IRPs are not likely to be approved and accepted by the Commission before the December 6, 2021, deadline in order to enable the Companies sufficient time to file an Act 62-compliant IRP update by the date set by the Commission's recent Directive. Duke's Petition for Reconsideration, p. 2, ¶ 1 (July 30, 2021).

The Companies' modified IRPs are due to be filed on August 27, 2021, which is sixty (60) days from the filing of Commission Order No. 2021-447 requiring modification to the Companies' 2020 IRPs. *Id.* § 58-37-40(c)(3). Thereafter, the Office of Regulatory Staff ("ORS") has up to sixty (60) days to review the modified IRPs and make a recommendation to the Commission "assessing the sufficiency of the revised filing," and other parties may submit comments pursuant to the same timeframe. *Id.* In this proceeding, ORS's report and any intervenor comments on the modified IRPs are then due to the Commission on October 26, 2021.

Duke argues that the most logical reading of the statutory timeline under Section 58-37-40 would be to require an annual update to be filed within twelve (12) months of that date—as an update to an accepted IRP must occur within the year following the accepted, final IRP under the plain meaning of Act 62.

III. LAW

Pursuant to S.C. Code Ann. § 58-27-2150, a party may apply to the Commission for a rehearing in respect to any matter determined in the proceeding.

After an order or decision has been made by the Commission any party to the proceedings may within ten days after service of notice of the entry of the order or decision apply for a rehearing in respect to any matter determined in such proceedings and specified in the application for rehearing, and the Commission may, in case it appears to be proper, grant and hold such rehearing. The Commission shall either grant or refuse an application for rehearing within twenty days, and a failure by the Commission to act upon such application within that period shall be deemed a refusal thereof. If the application be granted the Commission's order shall be deemed vacated, and the Commission shall enter a new order after the rehearing has been concluded.

Additionally, the Commission has held that:

The purpose of the petition for rehearing and/or reconsideration is to allow the Commission the discretion to rehear and/or reexamine the merits of issued orders, pursuant to legal or factual questions raised about those orders by parties in interest, prior to a possible appeal.

In re: South Carolina Electric & Gas Co., Order No. 2013-5 (Feb. 14, 2013).

S.C. Code Ann. Regs. 103-854(A) provides that a Petition for Rehearing or Reconsideration shall set forth clearly and concisely the factual and legal issues forming the basis for the petition, the alleged error or errors in the Commission Order, and the statutory provision or other authority upon which the petition is based. S.C Code Ann.

Regs. 103-854 states:

Unless otherwise provided by law, no cause of action shall accrue in any court of competent jurisdiction to vacate or set aside any Order of the Commission, either in whole or in part, unless a petition for rehearing or reconsideration and proof of service are filed with the Commission, and an Order has been issued disposing of the matter.

A. Form, Contents of Petition for Rehearing or Reconsideration. All petitions for rehearing or reconsideration shall conform to R. 103-825.

B. Time limit for filing a petition for rehearing or reconsideration. Except as otherwise provided by S. C. Code Ann., Section 58-5-330, 58-9-1200, 58-11-550, 58-27-2150 (1976), any party of record may, within 20 days after the date of receipt of Order, petition the Commission for rehearing or reconsideration. A Petition for Reconsideration shall be subject to the same statutory parameters as a Petition for Rehearing.

C. Action by the Commission. The Commission must act upon the petition for rehearing or reconsideration within thirty (30) days after such petition is filed except as otherwise provided by S. C. Code Ann., Section 58-5-330, 58-9-1200, 58-11-550, 58-27-2150 (1976). Failure to act within this time period shall be deemed a denial of the relief sought in the petition.

D. Effect of Filing a Petition. Filing a petition shall not excuse or delay compliance with an Order issued by the Commission, unless specifically provided by the Commission.

IV. DISCUSSION AND FINDINGS

A. Duke Companies' Request to Hold 2021 IRP Update Deadline in Abeyance is Granted In Part by Establishing New Deadline of December 6, 2021.

With respect to the request to hold the Companies' obligation to file the 2021 IRP Updates in abeyance until sixty (60) days after, or until no later than sixty (60) days after, the Commission approves the Duke Companies' Modified 2020 IRPs, the Companies raise a valid concern regarding the practical implications of the Companies performing its

Modified IRPs and IRP Updates in the currently contemplated timeframe. It is appropriate, then, to grant relief that would allow the Companies an opportunity to meaningfully produce the required Modified IRPs and to provide the statutorily required annual IRP Update.

In 2019, the General Assembly amended South Carolina Code Section 58-37-40 so as to provide that “[n]o later than three hundred days after an electrical utility files an integrated resource plan, the [C]ommission shall issue a final order approving, modifying, or denying the plan filed by the electrical utility.” S.C. Code Ann. § 58-37-40(C)(1) (Supp. 2020) (emphasis added). **The electrical utility then has to submit for Commission approval a revised or modified IRP to the Commission “within sixty days after the date of the final order”** which addresses concerns identified by the commission and incorporates Commission-mandated revisions to the IRP. S.C. Code Ann. § 58-37-40(C)(3) (Supp. 2020) (emphasis added). Thereafter, the Office of Regulatory Staff (ORS) shall review the electrical utility's revised plan and submit a report to the Commission on the sufficiency of the revised or modified IRP within sixty (60) days of the electrical utility's revised filing. *Id.* The Commission then has sixty (60) days from the date ORS files its sufficiency report to “determine whether or not to accept the revised integrated resource plan or to mandate further remedies that the Commission deems appropriate.” *Id.*

The Commission issued its order in compliance with Section 58-37-40(C)(1) on June 28, 2021. The Duke Companies have until August 27, 2021, to file a revised IRP, which is the sixtieth day for the utilities to file their respective revised, modified IRPs as required by the Commission. If the Duke Companies file their revised 2020 plans on August 27th, ORS has up until October 26, 2021 to review the revised 2020 IRPs and to

file a sufficiency report with the Commission. Thereafter, the Commission would have up and until December 25, 2021, to rule on whether or not the Duke Companies' revised 2020 IRPs are acceptable.

The Commission believes that the Duke Companies should be provided time to prepare their annual IRP Updates for 2021, the amount of time argued by the Duke Companies concerning twelve months following the acceptance of the modified IRP by the Commission is not adopted. It is clear that the General Assembly mandated for the Duke Companies to file an annual IRP Update with the Commission. Section 58-37-40(D)(1) clearly requires that an "electrical utility **shall** submit annual updates to its integrated resource plan to the commission." S.C. Code Ann. § 58-37-40(D)(1) (Supp. 2020) (emphasis added). The Commission does not have the discretion to waive the statutory requirement for the Duke Companies.

Additionally, the Commission is a state agency that must uphold and implement the laws enacted by the General Assembly. It cannot waive or fail to enforce the mandatory filing requirement of Code Section 58-37-40. As an administrative agency, the Commission "must follow the law as written until its constitutionality is judicially determined." *Layman v. State*, 376 S.C. 434, 447, 658 S.E.2d 320, 327 (2008) (citing *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 652, 595 S.E.2d 890, 892 (Ct.App.2004), quoting *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 241, 516 S.E.2d 655, 660–61 (1999)). The South Carolina Administrative Procedures Act states that:

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the

administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2020). The Commission finds that it is appropriate at this time to hold in abeyance the Duke Companies' statutory obligation to file their annual IRP Updates until sixty (60) days following an Order by the Commission approving and accepting the Duke Companies modified 2020 IRPs. In other words, the Duke Companies must file their annual IRP Updates for 2021 no later than sixty (60) days following the Commission Order approving and accepting their modified 2020 IRPs.

B. Request for Reconsideration and/or Clarification of Order No. 2021-447 Related to the Methodology for a Minimax Regret Analysis is Granted

With respect to the clarification requested in Ordering Clause 19, the Companies correctly note a scrivener's error. In Ordering Clause 19, the language "by CCEBA Witness Lucas" is incorrect and the ordering language should be "by ORS Witness Kollen" as intended by the Commission. This is consistent with Finding 24 of the Commission in Order No. 2021-447 at page 19 and the Commission Conclusion in Order No. 2021-447 at page 84.

Ordering Clause No. 19 should read:

19. In future IRPs, including Modified IRPs and IRP Updates, Duke shall perform and include a minimax regret analysis of the type described and performed in this proceeding by ORS Witness Kollen.

V. CONCLUSIONS

Consistent with the requirements of Regulation 103-854 and S.C. Code Ann. Section 58-27-2150, the Duke Companies timely filed the current motion or petition within ten days of the issuance of Order No. 2021-447.

The Companies should be awarded additional time to perform the 2021 IRP Updates, and holding such obligation in abeyance is appropriate at this time.

The Companies have correctly noted a scrivener's error in Ordering Clause 19 at page 89 of Order No. 2021-447. The correct language, consistent with the Findings and Conclusions of the Commission, was intended to instruct the Companies to perform the minimax regret analysis proposed by ORS Witness Kollen.

IT IS THEREFORE ORDERED:

1. The petition to hold the Duke Companies' obligation to file their 2021 IRP Updates in abeyance is granted as provided herein.
2. The Companies shall file their 2021 IRP Updates no later than sixty (60) days following the service of the Commission's Order approving and accepting the modified IRPs of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC.
3. The Commission clarifies that Order No. 2021-447 instructs the Companies to perform the minimax regret analysis recommended and described by ORS Witness Kollen.

4. This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



Justin T. Williams, Chairman
Public Service Commission of
South Carolina